NO. 82288-3

SUPREME COURT OF THE STATE OF WASHINGTON

DAVID KOENIG,

Appellant,

v.

CITY OF FEDERAL WAY,

Respondent.

BRIEF OF AMICUS CURIAE ATTORNEY GENERAL

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I. INTRODUCTION

Appellant, David Koenig, filed two public records requests with the City Manager of the City of Federal Way, Washington, seeking access to a number of records. In each request, Koenig asked for access to certain correspondence and other records maintained by the Municipal Court of Federal Way and its judges and other officers. CP 9, 48, 64. As to these records, the City took the position that documents in the custody of the municipal court were not subject to the Public Records Act (PRA) (RCW 42.56). CP 10, 49, 66-67.

When Koenig reiterated his request for the records, the City filed this action in the Superior Court for King County, seeking declaratory and injunctive relief. CP 3-6. The City filed a dispositive motion seeking an order that municipal court records are not subject to the PRA. CP 19-25. Koenig responded with a cross-motion for partial summary judgment. CP 28-45. The Superior Court granted the City's motion and denied Koenig's cross-motion. CP 102. Koenig has appealed to this Court. CP 104.

II. INTEREST OF AMICUS

The Attorney General: (1) advises state officers and state agencies in interpreting and applying the Public Records Act and, when necessary, represents them in legal actions under the Act; and (2) fulfills specific statutory roles in administering the Act, including the adoption of Model

Rules and the publication of educational materials (RCW 42.56.570), participation in the "Sunshine Committee" (RCW 42.56.140), and the provision of written opinions concerning certain agency denials of public inspection (RCW 42.56.530). In addition, the Attorney General recognizes the important public policy of the state of Washington, reflected in statute and common law, favoring public access to records relating to the conduct of government, absent circumstances where disclosure would harm the public interest. For these reasons, the Attorney General has a significant interest in the development of the law concerning disclosure of public records, and the scope and construction of the provisions of the Act.

III. ISSUES

This brief addresses the following two issues:

1. In addition to case files and other records directly relating to litigation, a municipal court generates and maintains correspondence and other records not related to specific cases. Are these records "court records" as defined by *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986) and related cases, and therefore not within the definition of a "public record" as set forth in RCW 42.56.010?

2. If the non case-related records of a municipal court are not "public records" for purposes of the PRA, are they, in whole or in part, nonetheless available for public inspection and copying under the common law?

IV. ARGUMENT

A. *Nast v. Michels* Is Settled Law As To Court Case Records

Nast v. Michels involved a public records request for superior court case files. One of the issues was whether the controlling law was the Public Disclosure Act (PDA) (then codified in RCW 42.17), the predecessor of the current PRA (now codified in RCW 42.56). The Court found that "the PDA definitions do not specifically include either courts or case files" and that "we find that they are not within the realm of the PDA." *Nast*, 107 Wn.2d at 306. The Court also noted that "[c]ourts have the inherent authority to control their records and proceedings." *Nast*, 107 Wn.2d 305, quoting from *Cowles Pub'g Co. v. Murphy*, 96 Wn.2d 584, 588, 637 P.2d 966 (1981). Although this Court found that the PDA did not cover court case files, the Court found that these files were freely accessible to the public under the common law and ordered King County to make the records in question available for public inspection and copying. *Nast*, 107 Wn.2d at 308-09.

Nast was decided over two decades ago. Although the legislature has amended the PDA on a number of occasions during that time, including its renaming and recodification as the PRA, none of the amendments have extended the definition of "public agency" to courts or judicial branch units of government, nor have they expressly included case

files or court records within the definition of "public record." *See,* RCW 42.56.010(1) and (2). The Legislature was presumably aware of *Nast* and under this Court's case law, is presumed to have acquiesced in the judicial interpretations of the PDA as not extending to court records. *Buchanan v. Int'l Bhd. Of Teamsters, Chauffeurs, Warehousemen and Helpers*, 94 Wn.2d 508, 617 P.2d 1004 (1980).

Since *Nast* was decided, the courts have continued to treat court case records as outside the definitions in the PDA and the PRA, and have instead applied common-law principles in deciding questions about public access to such records. As *Nast* itself shows, the common law generally makes case files and many other court records publicly accessible. In light of these facts, it is difficult to argue that *Nast* should be overruled. The doctrine of stare decisis "requires a clear showing that an established rule is incorrect and harmful before it is abandoned." *In re Rights to Waters of Stranger Creek,* 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Further, "[t]he Legislature is presumed to be aware of judicial interpretation of its enactments," and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language." *Friends of Snoqualmie Valley v. King County Boundary Review Bd.,* 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992). *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004).

B. This Court Must Now Address Whether *Nast* Applies To Court Administrative Files As Well As To Case Records

As noted above, *Nast* involved only actual case records and did not clearly decide whether the principles set forth in that decision applied equally to records that are not related to any specific case, but are related to court business and maintained within the court system.[1] This Court has not had occasion to address a case relating to such records, but there is Court of Appeals case law on the subject.

In *Beuhler v. Small*, 115 Wn. App. 914, 64 P.3d 78 (2003), an attorney filed a public records request for the notes used by a superior court judge in sentencing convicted criminal defendants. The request was based on the PDA and provisions of the State Constitution. The Court of Appeals first concluded that the PDA did not apply to the records, citing *Nast* for the proposition that "neither courts nor court case files are specifically included in the PDA and are not within its realm." *Beuhler*, 115 Wn. App. at 918. The Court of Appeals went on to an analysis of the common law, and concluded that the particular records in question were

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[1] The *Nast* court did state that "[t]he PDA definitions do not specifically include either courts or case files" and that "[a] reading of the entire public records section of the PDA indicates and we find that they are not within the realm of the PDA." *Nast*, 107 Wn.2d at 306. However the *Nast* court considered the question of whether the courts are subject to the PRA in the context of court case files. "Because court case files are within the province of the judiciary we must determine whether the judiciary and its case files are under the realm of the PDA." *Id.* The Court may conclude that *Nast* nonetheless settled the question of the applicability of the PRA to non-case court files. As discussed below, the court of appeals has so read *Nast*. However, the *Nast* opinion is not altogether clear in that respect and this Court can revisit the issue if it chooses to do so.

not subject to disclosure under the common law either, as disclosure of a judge's notes "would intrude upon a judge's subjective thoughts and deliberations and would actively discourage the judge from giving advance thought to a particular sentence." *Id.* at 920 (citations omitted). The court also rejected Beuhler's constitutional arguments. *Id.* at 920-21.

In *Spokane & E. Lawyer v. Tompkins*, 136 Wn. App. 616, 150 P.3d 158 (2007), a corporation requested access to correspondence between the judges of the Spokane County Superior Court and either the Washington State Bar Association or the Spokane County Bar Association. The request was apparently based solely on the PDA. Applying *Nast*, the Court of Appeals ruled that the PDA did not apply to the records of courts, whether or not the records were specifically related to a case. The *Tompkins* court noted that the *Nast* decision was couched in terms of "court records" rather than in terms of "case files." *Tompkins*, 136 Wn. App. at 620-21. Accordingly, the court concluded that a superior court "is not an agency under the PDA." *Id.* at 622. The *Tompkins* court did not analyze whether the correspondence in question would be disclosable under the common law.[2]

[2] In *Smith v. Okanogan Cy.*, 100 Wn. App. 7, 994 P.2d 857 (2000), the Court of Appeals considered a citizen's request for a variety of documents and other information, including copies of the oaths signed by the sitting judges of the county. The Court of Appeals held that the oaths were public records. *Smith*, 100. Wn. App. at 16-17. The opinion did not discuss whether these records should be regarded in any sense as "court

The applicability of the *Nast* principle to non case court records would be consistent with the analysis of the *Nast* decision and with the rationale behind it to the extent that *Nast* explicitly or implicitly reasons: (1) that courts are not "agencies" as defined in the PRA; (2) that at least some non case records also are publicly accessible under the common law; and (3) nondisclosure of some records unrelated to a specific case (judges' notes and memoranda for instance) is necessary to protect the integrity of the judicial process. However, as discussed below, treating court administrative records as governed solely by the common law raises issues as to how the public is to access such records and how the courts are to process and decide questions relating to public access to these records.[3]

Appellant Koenig in this case, like the litigants in *Beuhler* and in *Tompkins*, seeks to limit the *Nast* principle to actual case files, and asserts that other court records such as those sought in this case are therefore "public records" as defined in the PRA. Br. of App. at 16-17. Koenig suggests that court records other than case files should be regarded as subject to the PRA, limited only to the extent that disclosing such records

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records" or whether *Nast* applied, perhaps because the records were maintained by the Secretary of State. *Id.* at 17, n.6.

[3] RCW 2.32.050(10) provides that it is the duty of the clerk of the supreme court, the court of appeals, and each county clerk "[t]o publish notice for the procedures for inspection of the public records of the court." Whether this duty applies to non case court records is unclear and we have located no similar statutory provision relating to municipal courts.

would not violate the doctrine of separation of powers. Br. of App. at 17-23.

The Attorney General shares Koenig's concern that *Nast* not be treated as a "blanket" exemption of non-case judicial records from public disclosure (a result that would be completely inconsistent with the *Nast* opinion itself). Although there is considerable common law establishing the right of public access to case files, and the exceptions to that right, there is no well-established body of case law concerning access to the various categories of records developed and maintained by the judicial branch of government that do not directly relate to litigation or the adjudication process.

As an alternative to developing a body of case law for such records, the Court could permit them to be treated as "public records" under the PRA, with its established substantive and procedural standards relating to public access. Or, the Court could define courts as "agencies" for purposes of RCW 42.56.010, as to those records that are not case files governed by the common law.

C. If Court Administrative Records Are Not Subject To RCW 42.56, But To Common Law Principles, Standards Are Needed As To How To Apply The Common Law To Those Records

As *Nast* itself shows, finding that a record is not subject to the PRA does not amount to finding that the record is not available for public

inspection and copying. Wholly aside from the PRA, both the Constitution and the case law recognize that court records are generally open for public inspection. Article I, section 10 of the State Constitution provides that "justice in all cases shall be administered openly." This Court has applied the principle in cases such as *Rufer v. Abbott Lab.*, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005), in which the Court stated that "we presume court records will be made open and available for public inspection" while recognizing that court records may be sealed to protect "other significant and fundamental rights" (citing *Dreiling v. Jain*, 151 Wn.2d 900, 909, 93 P.3d. 861 (2004)).

Although *Rufer* involved sealing evidence in a case file, the principles apply equally to records generated or maintained by the courts that do not relate to specific cases, including records of the type requested by Koenig in this case. The public interest in open government is equally strong, whether the issue is how the court proceeded in a litigation matter, or how the court proceeded in an administrative issue such as managing the court's budget. In both cases, there are recognized exceptions such as protecting the internal deliberative process of the court (the issue in *Beuhler*), or protecting a court's ability to be candid in handling matters of attorney conduct and discipline (possibly the issue in *Tompkins*).

There is a certain attractiveness in holding that all court records, case-related or otherwise, are outside the definition of "public records" in the PRA, and subject to disclosure under common law principles. So holding would draw a bright line between records maintained by the courts (including case files) and records maintained by the other branches of state and local government. Furthermore, it would permit analysis of court records taking into account the specific duties and functions of the court system, rather than applying the PRA, which was drafted primarily to deal with issues raised by the disclosure of executive branch records.

However, absent further direction from the Court, such a holding would lead both the courts and the public into uncharted waters. As noted earlier, there is no body of case law defining which court administrative records are available for public access, particularly if the PRA and its various exceptions are inapplicable. If the PRA is inapplicable, there also appear to be no established procedures stating how such records might be requested, who is responsible to respond to disclosure requests, or how disputes will be resolved. The public and the lower courts will have no choice but to litigate both procedure and substance on a case by case basis,

absent Court decision or rule setting forth the standards and processes governing public access to such records.[4]

Some states have handled the public disclosure issue through the adoption of rules or policies setting substantive standards and procedural prerequisites for access to judicial records. For instance, the Supreme Court of Alaska has adopted Administrative Rules 37.5 through 37.8 (Attachment A to this Brief), covering both case records and administrative records of the courts, and setting forth the standards for access to these records.[5] Rule 37.5(d) establishes a presumption of public access, and Rule 37.5(e) sets forth the exceptions, including memoranda and drafts relating to litigation, documents sealed by court order, certain personal information relating to court employees, certain work product, and information that could compromise the safety of the court staff or the integrity of the court's facilities. Alaska Admin. Rules, *Rules Governing the Administration of All Courts*, Rules 37.5-37.8 (effective October 15,

[4] See, e.g., *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978) recognizing and citing cases for the principle that "the courts of this country recognize the general right to inspect and copy public records and documents, including judicial records and documents", but not defining the contours of the process or right. *See also, WA Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1994), concluding that access to public records under the common law turns on balancing government interests in secrecy against the public interest in disclosure. "Note that this balancing test should not be an abstract inquiry, but should focus on the specific nature of the governmental and public interests as they relate to the document itself, as well as the general public interest in the openness of governmental processes." *Id.* at 1452.

[5] This Court has adopted General Rule 31 concerning access to court records, but the rule does not cover administrative records. GR 31(b). We have located no separate rule covering these administrative records.

2006). *See also*, State of Maine Supreme Judicial Court, Administrative Order JB-05-20, *Withdrawal of Administrative Orders* (effective August 1, 2005) (Attachment B to this Brief), detailing how the Maine courts handle public information requests.

This Court could adopt standards for public access to court records along the lines used by other states, or it could adopt by reference the standards set forth in the PRA, either in whole or in part. In the absence of the adoption of rules or policies, requests for access to judicial administrative records will have to be considered on a case by case basis. In the present case, where Koenig has requested copies of court correspondence on several topics, the court should start with the presumption that court administrative records, like case records, are generally and presumptively open to public access. Specific documents might be exempt from disclosure, however, based on principles such as those detailed in the Alaska Rules or in case law.[6]

If the Court does not hold that court administrative records are subject to the PRA, the alternative is to remand this case to the trial court with guidance as to whether the categories of documents at issue, are

[6] The record does not disclose, of course, whether the municipal court is in possession of records responsive to Koenig's request, or what the nature of those records might be.

available for public inspection under the common law, and as to whether any of them are exempt from disclosure in whole or in part.

V. CONCLUSION

For the reasons discussed above, the Court should either (1) reverse the trial court's finding that the records at issue are not "public records" as defined by the Public Records Act, or (2) if the Court finds that the records are not subject to the Public Records Act, remand the case to the trial court with guidance as to how to apply common law principles to the issues presented.

RESPECTFULLY SUBMITTED this 8th day of

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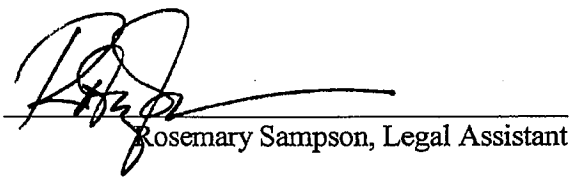

Rosemary Sampson, Legal Assistant

Attachment A

the administrative director with a list identifying and designating any original case documents or records contained in those cases which have present or potential historical or archival value. The administrative director shall provide for the microphotographing and safekeeping of all original case documents and records so identified.

(e) A photographic reproduction of any of the records described in this rule, the negative or film of which has been certified by the person in charge of such reproduction as a correct copy of the original, shall be received in evidence in all courts in like manner as the original.

(Adopted by SCO 412 effective July 1, 1980; amended by SCO 586 effective April 4, 1984)

Cross References

CROSS REFERENCE: Administrative Bulletins 25 PDF (Records Retention Schedule); 46 PDF (Micrographics Quality Control Standards)

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Rule 37.5. Access to Court Records.

(a) **Scope and Purposes.**

(1) Public access to court records is governed by Administrative Rules 37.5 through 37.8. These rules are adopted pursuant to the inherent authority of the Alaska Supreme Court and provide for access in a manner that:

(A) maximizes accessibility to court records;

(B) supports the role of the judiciary;

(C) promotes government accountability;

(D) contributes to public safety;

(E) minimizes risk of injury to individuals;

(F) protects individual privacy rights and interests;

(G) protects proprietary business information;

(H) minimizes reluctance to use the courts to resolve disputes;

(I) makes most effective use of court personnel;

(J) provides excellent customer service; and

(K) does not unduly burden the ongoing business of the judiciary.

(2) These rules apply to all court records; however, court personnel need not redact or restrict information that otherwise was public in case records and administrative records created before October 15, 2006.

(b) **Who Has Access to Court Records.**

(1) Every member of the public will have the same access to court records under these rules, except as provided in Administrative Rule 37.8(b)(4) and 37.8(c)(2).

(2) The following persons are not members of the public and may have greater access in accordance with their functions within the judicial system:

(A) court personnel for case processing purposes only;

(B) people or entities, private or governmental, who assist the court in providing court services;

(C) public agencies whose access to court records is defined by another statute, rule, order, or policy; and

(D) the parties to a case or their lawyers regarding access to records in their case.

(c) **Definitions.** For purposes of these rules:

(1) "Court record" means both case records and administrative records, but does not include records that may be in the court's possession that do not relate to the conduct of the court's business.

(2) "Case record" means any document, information, data, or other item created, collected, received, or maintained by the court system in connection with a particular case.

(3) "Administrative record" means any document, information, data, or other item created, collected, received, or maintained by the court system pertaining to the administration of the judicial branch of government and not associated with any particular case.

(4) "Confidential" means access to the record is restricted to:

(A) the parties to the case;

(B) counsel of record;

(C) individuals with a written order from the court authorizing access; and

(D) court personnel for case processing purposes only.

(5) "Sealed" means access to the record is restricted to the judge and persons authorized by written order of the court.

(6) "Remote access" means the ability of a person to inspect and copy information in a court record in electronic form through an electronic means.

(7) "In electronic form" means any information in a court record in a form that is readable through an electronic device.

(d) **General Access Rule.**

(1) Court records are accessible to the public, except as provided in paragraph (e) below.

(2) This rule applies to all court records, regardless of the manner of creation, method of collection, form of storage, or the form in which the record is maintained.

(3) If a court record, or portion thereof, is excluded from public access, there must be a publicly accessible indication of the fact of exclusion but not the content of the exclusion. This subparagraph does not apply to case records or administrative records that are confidential pursuant to law.

(e) **Court Records Excluded from Public Access.**

(1) *Case Records.* The following case records and case-related documents are not accessible to the public:

(A) memoranda, notes, or preliminary drafts prepared by or under the direction of any judicial officer of the Alaska Court System that relate to the adjudication, resolution, or disposition of any past, present, or future case, controversy, or legal issue;

(B) legal research and analysis prepared or circulated by judges or law clerks regardless of whether it relates to a particular case and written discussions relating to procedural, administrative, or legal issues that are or may be before the court; and

(C) documents, information, data, or other items sealed or confidential pursuant to statute, court rule, case law, or court order.

(2) *Administrative Records.* The following administrative records are not accessible to the public:

(A) personal information, performance evaluations, and disciplinary matters relating to any past or present employee of the Alaska Court System or any other person who has applied for employment with the Alaska Court System, and personnel records that are confidential under Alaska Court System Personnel Rules C1.07 and PX1.08;

(B) the work product of any attorney or law clerk employed by or representing the Alaska Court System if the work product is produced in the regular course of business or representation of the Alaska Court System;

(C) individual direct work access telephone numbers and email addresses of judges and law clerks;

(D) documents or information that could compromise the safety of judges, court staff, jurors, or the public, or jeopardize the integrity of the court's facilities or the court's information technology or recordkeeping systems;

(E) records or information collected and notes, drafts, and work product generated during the process of developing policy relating to the court's administration of justice and its operations;

(F) email messages that are created primarily for the informal communication of information and that do not set policy, establish guidelines or procedures, memorialize transactions, or establish receipts; and

(G) records that are confidential, privileged, or otherwise protected by law, rule, or order from disclosure.

(f) **Obtaining Access to Public Court Records.** Court records that are accessible to the public shall be open to inspection at all times during the regular office hours of the courts. The administrative director shall establish written guidelines to insure that all members of the public upon request will be given reasonable access and opportunity to inspect such public records and to insure the preservation and safekeeping of such public records for such period of time as they may be kept by the Alaska Court System.

(Adopted by SCO 503 effective February 1, 1982; amended by SCO 943 effective January 15, 1989; and by SCO 1016 effective January 15, 1990; rescinded and readopted by SCO 1622 effective October 15, 2006)

Cross References

CROSS REFERENCE: Administrative Bulletin 12 PDF (Guidelines for Inspecting and Obtaining Copies of Public Records)

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Rule 37.6. Prohibiting Access to Public Case Records.

(a) **Limiting Access.** Notwithstanding any other rule to the contrary, the court may, by order, limit access to public information in an individual case record by sealing or making confidential the case file, individual documents in the case file, log notes, the audio recording of proceedings in the case, the transcript of proceedings, or portions thereof. A request to limit access may be made by any person affected by the release of the information or on the court's own motion.

(b) **Standard.** The court may limit public access as described above if the court finds that the public interest in disclosure is outweighed by a legitimate interest in confidentiality, including but not limited to (1) risk of injury to individuals;

(2) individual privacy rights and interests;

(3) proprietary business information;

(4) the deliberative process; or

(5) public safety.

(c) **Least Restrictive Alternative.** In limiting public access the court must use the least restrictive means that will achieve the purposes of these public access rules and the reasonable needs as set out as the basis for the request, without unduly burdening the court.

(d) **Procedure.** Any request to limit access must be made in writing to the court and served on all parties to the case unless otherwise ordered. A request to limit access, the response to such a request, and the order ruling on such a request must be written in a manner that does not disclose non-public information, are public records, and shall not themselves be sealed or made confidential.

(Adopted by SCO 1622 effective October 15, 2006; amended by SCO 1633 effective May 15, 2007)

Note: Administrative Rule 40 requires the clerk of court to list a case on the public case index even though the case file has been sealed or made confidential under this rule. Only the presiding judge of the judicial district has the power to remove a party's name from the public case index, and this action may be taken only in very limited circumstances. See Administrative Rule 40(b) and (c).

The terms "confidential" and "sealed" are defined in Administrative Rule 37.5(c).

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Rule 37.7. Obtaining Access to Non-Public Court Records.

(a) **Allowing Access to Non-Public Records.** The court may, by order, allow access to non-public information in a case or administrative record if the court finds that the requestor's interest in disclosure outweighs the potential harm to the person or interests being protected, including but not limited to:

(1) risk of injury to individuals;

(2) individual privacy rights and interests;

(3) proprietary business information;

(4) the deliberative process; or

(5) public safety.

Non-public information includes information designated as confidential or sealed by statute or court rule and public information to which access has been limited under Administrative Rule 37.6. A request to allow access may be made by any person or on the court's own motion as provided in paragraph (b).

(b) **Procedure.** Any request to allow access must be made in writing to the court and served on all parties to the case unless otherwise ordered. The court shall also require service on other individuals or entities that could be affected by disclosure of the information. A request to

allow access, the response to such a request, and the order ruling on such a request must be written in a manner that does not disclose non-public information, are public records, and shall not themselves be sealed or made confidential.

(Adopted by SCO 1622 effective October 15, 2006)

Note: This rule does not apply to bulk or compiled data. Access to bulk and compiled data is governed by Administrative Rule 37.8(b)-(d).

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Rule 37.8. Electronic Case Information.

(a) **Availability.** The following case-related information maintained in the court system's electronic case management systems will not be published on the court system's website or otherwise made available to the public in electronic form:

(1) addresses, phone numbers, and other contact information for parties and witnesses;

(2) names, addresses, phone numbers, and other contact information for victims in criminal cases;

(3) social security numbers;

(4) driver and vehicle license numbers;

(5) account numbers of specific assets, liabilities, accounts, credit cards, and PINs (Personal Identification Numbers);

(6) names of minor children in domestic relations cases, including paternity actions, domestic violence cases, emancipation cases, and minor settlements under Civil Rule 90.3;

(7) juror information;

(8) party names protected under Administrative Rule 40(b) and (c); and

(9) information that is confidential or sealed in its written form.

(b) **Bulk Distribution of Electronic Case Information.**

(1) Bulk distribution is defined as the distribution of all or a significant subset of the case information in the court system's electronic case management systems, as is, and without modification or compilation.

(2) Bulk distribution of case information is permitted, unless the information is not publicly available in electronic form under subsection (a) of this rule.

(3) Bulk distribution of imaged case records is not allowed, unless the records are already remotely accessible to the public on the court system's website.

(4) The administrative director may allow bulk distribution of case information that is not publicly available and of publicly available imaged case records for scholarly or governmental purposes. The administrative director shall adopt procedures to protect the security of information and records released under this paragraph.

(c) **Distribution of Compiled Information.**

(1) Compiled information is defined as information that is derived from the selection, aggregation, or reformulation of case information in the court system's electronic case management systems.

(2) Information routinely compiled by the court may be made available unless the compiled information is privileged or reveals information that is confidential, sealed, or not available to the public under subsection (a) of this rule. A request from a person outside the court system for other compiled information must be approved by the administrative director. The request may be granted if resources are available to compile the information and if it is an appropriate use of public resources, such as for scholarly, governmental, or any other purpose in the public interest.

(d) **Fees.** The administrative director may establish fees for distribution of information under subsections (b) and (c) of this rule.

(Adopted by SCO 1622 effective October 15, 2006; amended by SCO 1633 effective May 15, 2007)

Note to Administrative Rule 37.8(a)(7): Juror information is also protected by Administrative Rule 15(j).

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Rule 38. Reports to Bureau of Vital Statistics--Superior Courts.

(a) **Divorce -- Annulment -- Adoption.** Before judgment or decree is entered in any action for divorce or annulment or proceeding for adoption, the court shall require the parties or their counsel to submit such personal particulars and other information necessary to enable the clerk to prepare a record of such divorce, annulment or adoption in accordance with law and the regulations and instructions of the Bureau of Vital Statistics. Every such record shall be prepared by the clerk and filed in the manner and within the time prescribed by law and the regulations and instructions of the Bureau of Vital Statistics.

(b) **Change of Name -- Delayed Birth Certificate -- Legitimation.** In the following actions and proceedings, the court shall file with the Bureau of Vital Statistics such reports, information and copies of judgments and orders as may be required and in the manner provided by law and the regulations and instructions of the Bureau:

Attachment B

STATE OF MAINE
SUPREME JUDICIAL COURT

ADMINISTRATIVE ORDER JB-05-20 (A. 1-06)

PUBLIC INFORMATION AND CONFIDENTIALITY

Effective: January 1, 2006

This order amends JB-05-20 signed June 29, 2005 and effective August 1, 2005.

I. SCOPE AND PURPOSE

This order governs the release of public information and the protection of confidential and other sensitive information within the Judicial Branch. It is the policy of the Judicial Branch to provide meaningful access to court dockets, case files, and related information to the public; to appropriately and consistently respond to nonroutine requests by the public for information; to protect information which is designated as confidential from inadvertent or inappropriate disclosure and to assure that sensitive information is only communicated to appropriate recipients outside of the Judicial Branch. This order applies to all case types, including civil and criminal cases.

II. DEFINITIONS

As used in this order, the following terms have the following meanings:

A. "Aggregate information" means a request for information that is not maintained in the requested form and that would have to be assembled or derived from other records.

B. "AOC" means the Administrative Office of the Courts.

C. "At and by courts" means information or records of public judicial proceedings that are maintained at a clerk's office or transferred to the Records Center or other records storage under the control of a clerk's office.

D. "Clerk's office" means the office of the Clerk of the Law Court or of any Superior or District Court.

E. "Criminal history record information" has the same meaning as is defined by Title 16, section 611, subsection 3, of the Maine Revised Statutes Annotated.

F. "Criminal justice agency" has the same meaning as is defined by Title 16, section 611, subsection 4, of the Maine Revised Statutes Annotated and includes, but is not limited to, police agencies, border patrol, sheriff's offices, probation and parole, jails, Department of Attorney General, and District Attorneys' offices.

G. "Confidential information" means:

1. the information or a portion of the information is made confidential by statute, policy or rule, or

2. the information or a portion of the information was impounded or sealed by a judge or is the subject of a pending motion or other request for impoundment or sealing,[1] or

3. the information is contained in judge's, magistrate's, or law clerk's notes, judge's, magistrate's, or law clerk's drafts, communications between judges, magistrates, or clerks regarding the decision of cases, or other judicial working papers, or

4. the information is contained in or relates to a pending request for or an outstanding search warrant, arrest warrant, or other document that contains confidential law enforcement information[2], or

5. psychiatric and child custody reports which shall be impounded upon their receipt by the clerks subject to the following rules:

(a) The clerks shall notify counsel of record or self-represented parties of the receipt of any such reports and permit counsel or self-represented parties to inspect such reports at the clerk's offices; in criminal cases the clerks shall also make available to counsel or self-represented parties copies of the same if they have not otherwise received copies; and

(b) Such reports may in whole or in part be released from impoundment by specific written authorization of the court under such conditions as the court may impose; and

(c) Such reports may be used in evidence in the proceeding in

connection with which it was obtained.

H. "Judge" means a Justice of the Supreme Judicial Court or Superior Court, a Judge of the District Court, or the Chief Justice or Judge of those courts.

I. "Nonconviction data" has the same meaning as defined by Title 16, section 611, subsection 9, of the Maine Revised Statutes Annotated.

J. "Noncriminal justice agency" means a governmental entity or agency which is not engaged in the administration of the criminal justice system.

K. "Nonroutine request" means a request for information that is not contained in case files, dockets, indices, lists, or schedules, or a request that seeks confidential, impounded, or sealed information.

L. "OIT" means the Office of Information Technology within the Administrative Office of the Courts.

M. "Public information" means any information that is not confidential information.

N. "Routine request" means a request for information that is contained in case files, dockets, indices, lists, or schedules, or a request that does not seek confidential, impounded, or sealed information.

O. "SBI" means State Bureau of Identification.

P. "Scheduling information" means information listing or pertaining to the scheduling of a judicial activity related to a pending case.

Q. "Standing request" means a request for information or record or a type of information or record that is intended to be a continuing request, with supplementary responses as new information becomes available.

III. RECORDS MAINTAINED AT OR BY COURTS

A. In Person or Mail Requests

1. Information and records relating to cases that are maintained in case files, dockets, indices, lists, or schedules by and at the District, Superior, or Supreme Judicial Courts are generally public and access will be provided to a person who requests to inspect them or have copies made by clerk's office staff unless the information or a portion of it is confidential as provided in Part II, ¶ G.

Clerks will endeavor to provide the information requested using the following timetable:

1-5 names within 5 working days
6-10 names within 30 working days
11-15 names within 45 working days
16-20 names within 60 working days
21+ names to be determined by the Clerk

Persons making requests for information for multiple names or cases for which both case name and case docket are not provided will be charged a research fee as provided in the Judicial Branch fee schedule.

2. Records that are confidential or that contain information designated as confidential, materials that have been impounded or sealed by a judge, materials that are subject to a pending motion or other request for impoundment or sealing; or judge's, magistrate's, and law clerk's notes and workpapers will be placed in a separate sealed envelope in the file, and the file or record must have a label conspicuously affixed to it indicating that the file or record contains confidential materials.[3] If a request for access is made concerning the nonconfidential portion of a record, the clerk will remove the confidential materials before making the record available for inspection. Requests for inspection of confidential materials contained within a case file must be made by motion with notice to all parties of record as provided in the Maine Rules of Civil Procedure or Maine Rules of Criminal Procedure.

3. Individual criminal history records containing both conviction and nonconviction data maintained by and at a clerk's office are open to public inspection and copying, and will be supplied if the records or indexes are not located in a publicly accessible place.

4. If there is any doubt whether information is confidential information, Judicial Branch personnel should proceed cautiously in responding to the information request and provide access to information only when it is clearly appropriate to do so, or after consultation with a judge or the Director of the Office of Clerks of Court. Nonroutine requests should be referred to the appropriate member of the Administrative Team.

5. Requests for information that would require clerk's office staff to perform research or provide aggregate information and standing requests must be declined, unless the Chief Judge or Justice has preauthorized a response, and the requestor should be informed that the requestor may conduct the research by examining the dockets themselves, or by using the public access terminal where one is available.

6. Admitted and proffered exhibits, including both documents and physical items, are part of the public record of a case, and while in the custody of the clerk's office, are available for inspection and copying unless they are otherwise confidential. Exhibits submitted to the clerk, but never proffered or admitted, will be made available to the submitting party, but are subject to inspection or copying while in the custody of the clerk's office. Public copying or inspection may be limited by the terms of a protective order or by a judicial order or administrative order governing the handling of contraband or dangerous materials.

7. Juror questionnaires, the records and information used in connection with the juror selection process, and the names drawn are confidential and may not be disclosed to any person, except by judicial order. During the period of service of jurors and prospective jurors, the names of the members of the jury pool are confidential and may not be disclosed, except to the attorneys and their agents and investigators and the pro se parties.

Once the period of juror service has expired, a person may file a written request for disclosure of the names of the jurors and an affidavit stating the basis for the request. The court may disclose the names of the jurors only if the court determines that the disclosure is in the interests of justice.

B. Telephone Requests for Information

1. Due to the risks of misunderstanding, misinterpretation, or incorrect quotation of oral information, it is the policy of the Judicial Branch to carefully limit the release of information by telephone. Clerks' office staff may respond to telephone requests for information **only** in the following circumstances:

(a) Information about the status of a particular case may be given to parties, counsel, or other agencies with an interest[4] in

that matter, and

(b) Scheduling information on nonconfidential cases may be released to any caller.

(c) Information may be given to criminal justice agencies as follows:

(i) Police emergencies or other urgent legitimate needs. If information is needed to respond to an emergency or for another situation in which an immediate response is needed, such as a patrol stop, border check, suspect in custody, check of imposed sentencing conditions, including conditions of probation, or a check of pending charges against a person under investigation, court personnel may provide the requested information by telephone, with a caution that it is partial information and that it only reflects the information maintained at that court.

(ii) Other criminal justice agency requests. Court personnel should evaluate the nature of the requested information and the need for a quick response against the other workload considerations in the court. The general rule is not to respond by phone, but to refer the requestor to SBI or to tell the requestor to get the information when next in court. However, for one-time requests when common sense dictates it, court personnel may provide the information over the telephone.

(d) Information may be given to noncriminal justice governmental agencies (i.e., Health and Human Services, Department of Environmental Protection, military recruiters, etc.) in limited circumstances. These requests, in general, should not be responded to over the phone and should be responded to in the same manner as other telephone requests. However, all situations cannot be anticipated and clerks will sometimes be presented with an urgent need for information by a noncriminal justice agency (i.e., a request from the Department of Health and Human Services about a criminal record when they are in the process of preparing an emergency child protective matter). In those limited situations clerks have the discretion to respond by telephone, with the caution that the provided information is partial and reflects only the information maintained at that court.

2. Telephone requests for comprehensive criminal history record information must be referred to the State Bureau of Investigation pursuant to Title 16, section 616, of the Maine Revised Statutes Annotated. Telephone requests for traffic record information must be referred to the Bureau of Motor Vehicles, which maintains records of motor vehicle violations pursuant to Title 29-A, section 2607, of the Maine Revised Statutes Annotated. Telephone requests for Fish and Wildlife offense information should be referred to the Maine Warden's Service, which maintains records of violations of related portions of Title 12 of the Maine Revised Statutes Annotated. Telephone requests for Marine Resources offense information should be referred to the Marine Patrol, which maintains records of violations of related portions of Title 12 of the Maine Revised Statutes Annotated.

3. In order to eliminate the dangers of misunderstanding or inaccuracy, telephone requestors of other information about a specific case should be told to make a written inquiry or to visit the court to examine the records themselves.

4. Telephone requests for information that would require clerk's office staff to perform research or provide aggregate information and standing requests for categories of information must be declined, and the requestor informed that the requestor may conduct the research at the clerk's office.

C. Transcripts or Recordings of Court Hearings

Requests for transcripts or recordings of court hearings are governed by Administrative Order.

IV. RECORDS MAINTAINED AT OR BY AOC OR OIT

A. Routine Information Requests

Staff members may respond to routine requests for nonconfidential information if the information can be provided without a material expenditure of staff time to compile or aggregate the requested information and if the request does not involve personnel information or other sensitive or controversial issues. The staff member shall notify the State Court Administrator of the nature of the request and the type of information provided.

B. Nonroutine Information Requests

If,
(1) a formal request for information is made, or
(2) responding to a request will require a material expenditure of staff time, or
(3) a request involves confidential information or information that the receiving staff member considers potentially sensitive or controversial in light of the identity of the requestor, the content of the information, or the nature of the request,

the staff member shall consult with the appropriate Administrative Team member.

C. Routine Personnel Information Requests

Personnel information is not generally available to the public. An employee may request information from that employee's personnel file or employment records by contacting the Director of Human Resources. An employee may also authorize a third party to verify employment or to obtain specified information from the employee's file or records through the Director of Human Resources. A union may request information about an employee or group of employees, to the extent authorized by statute or an applicable collective bargaining agreement, from the Director of Human Resources. The Director shall provide the requested information unless the request is not properly authorized, or violates the affected employee's rights to privacy, and in those circumstances the Director shall refer the request as provided in paragraph B.

Requests for information pertaining to an employee or group of employees, including performance or statistical information, from requestors other than the employee or an authorized union are nonroutine requests subject to referral under paragraph B.

D. Fees

Fees will be charged for the provision of documents or information in accordance with applicable statutes, court rules, administrative orders, and fee schedules, where they apply. If there is no applicable statute, court rule, policy, or fee schedule which applies to a specific document or record, inspection of the document shall be provided at no charge and copies of documents shall be made and provided at the rate then in effect as set by the Fee Schedule.

Requests for electronic data, or for extracts, abstracts, or compilations of documents or records which involve a material expenditure of effort by Judicial Branch personnel require a special determination and will be responded to after consideration of:

(1) the availability of personnel to fulfill the request,
(2) the response time, if any was requested, and
(3) the other workload of the affected staff.

If such a request is granted, the requestor shall be assessed a fee which is sufficient to cover the Judicial Branch's full actual costs, including staff time and associated overhead, for producing the requested information. The response and fee shall be determined by the appropriate member of the Administrative Team in consultation with the State Court Administrator.

V. DISSEMINATION OF OTHER INFORMATION

Pursuant to the Judicial Branch Code of Conduct, Judicial Branch employees are limited from disclosing court-related information other than in the performance of an official duty.

For the Court,

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Leigh I. Saufley
Chief Justice

Promulgation Date: December 19, 2005

Historical Derivation of JB-05-20:

Public Information And Confidentiality
AO JB-05-20, Dated: June 29, 2005 and effective August 1, 2005
Signed by: Leigh I. Saufley, Chief Justice, Maine Supreme Judicial Court

Public Information And Confidentiality
AO JB-03-04, Dated: May 13, 2003
Signed by: Leigh I. Saufley, Chief Justice, Maine Supreme Judicial Court; Nancy Mills, Chief Justice, Maine Superior Court; and Vendean V. Vafiades, Chief Judge, Maine District Court
which replaced SJC-138, Dated: May 28, 1996; and SJC-138, Dated: June 11, 1996

Amended Order Regarding Psychiatric And Child Custody Reports
AO Dated: March 31, 1980
Signed by: Vincent L. McKusick, Chief Justice; and Sidney W. Wernick, Edward S. Godfrey, David A Nichols, Harry P. Glassman, David G. Roberts, Associate Justices, Maine Supreme Judicial Court

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[1] In some limited circumstances, all information about a case may be impounded, specific information within a case, such as the identity of a party, or the fact that an impoundment motion was made and granted may be impounded or sealed. In these circumstances, judges need to make the scope of the impoundment order clear to the clerk's office. The clerk's office and OIT staff must take appropriate steps to ensure that the impounded information is not reflected in publicly available materials such as dockets, indices, and displays at public access terminals.

[2] This provision does not prohibit the release of executed or unexecuted warrants for failure to appear or failure to pay fines, fees, or restitution.

[3] Clerks are encouraged to use a separate filing system for confidential materials, in which the materials are separately kept from the case files, where space and operational considerations permit such a system.

Judges may also maintain a confidential filing system for notes and workpapers, or may destroy them at the conclusion of the case.

[4] If a clerk has reason to doubt that the caller is a party or party's counsel, the clerk should call back at the telephone number kept on file for that party or counsel. Agencies with an interest in a matter include, for example, Probation and Parole, the Department of Corrections, or other law enforcement agencies.